

5 Official Opinions of the Compliance Board 200 (2007)

QUASI-LEGISLATIVE FUNCTION – REASSIGNMENT OF FRANCHISE HELD TO BE A QUASI-LEGISLATIVE FUNCTION

December 19, 2007

Mr. Joseph H. Potter

The Open Meetings Compliance Board has considered your complaint alleging that the Mayor and City Council of Ocean City (hereafter “City Council”) violated the Open Meetings Act by holding a closed meeting on October 1, 2007. In a timely response, City Solicitor Guy R. Ayres, III, defended the closing of this meeting on the grounds that the topic of discussion, assignment of a beach vending franchise, falls within the “administrative function” exclusion from the Act. We hold that this topic is not excluded from the Act. Therefore, the meeting was subject to the Act’s requirements for closing a meeting. We express no opinion on whether these requirements were correctly followed.

I

Complaint and Response

According to the complaint, the City Council held a closed meeting on the evening of October 1 “to discuss legal and contractual matters.” A publically available “report of closed session” indicated that the meeting had been closed on the basis of three exceptions in §10-508(a) of the Act.¹ The summary of the action taken by the City Council indicated that the Council had approved the reassignment of certain beach equipment rental franchises from one individual to two others.

In his response, Mr. Ayres did not elaborate on the basis for the City Council’s invocation of these three exceptions or the procedures followed prior to

¹ All statutory references are to the State Government Article, Annotated Code of Maryland. The exceptions invoked were §10-508(a)(7), involving consultation with counsel to obtain legal advice; §10-508(a)(8), involving consultation about pending or potential litigation; and §10-508(a)(14), involving certain discussion directly related to a negotiation strategy for the content of the bid or proposal. The materials available to us do not establish whether assertion of these exceptions reflected voluntary compliance with §10-508, despite the City Council’s view that the topic was an administrative function excluded from the Act, or a disclosure about a session recessed to carry out an administrative function pursuant to §10-503(c).

the closing of the session. Rather, Mr. Ayres contended that the City Council's discussion of reassigning the franchises was an administrative function not subject to the Open Meetings Act at all. Given the response, we express no opinion about the application of these exceptions to the discussion. We lack enough information to do so. *See* §10-502.5(f)(2). Instead, we consider the issue raised by Mr. Ayres: Is discussing reassignment of a franchise an administrative function?

II

Analysis

In 5 *OMCB Opinions* 7 (2006), we held that a franchise awarded by Ocean City under its beach equipment rental franchise ordinance amounted to a contract between Ocean City and the operator who is granted a franchise. The City Council's letter did not disagree with this characterization of the franchise.

The 2006 opinion also examined whether the City Council's consideration of a franchise reassignment was part of the process of "approving, disapproving, or amending [the franchise] contract" – that is, a quasi-legislative function subject to the Act, not an administrative function excluded from the Act. §§10-502(b) and (j) and 10-503(a). We wrote that reassigning a franchise "amounts either to an amendment of the contract for the particular parcel, to substitute a new operator, or approval of a new contract with the replacement operator. Either way, this is not an [administrative] function, but rather a quasi-legislative function to which the Act applied." 5 *OMCB Opinions* at 9.

The City Council's position is that we were wrong in equating an assignment of a franchise with an amendment to a contract. We were indeed wrong in equating the two. Although we need not explore the outer reaches of what might count as "amending a contract," the core meaning of the term undoubtedly refers to a contract modification – that is, an adjustment of an ongoing contractual relationship. *See* Caroline Brown, 4 *Corbin on Contracts* §13.1, at 167 (1997). An assignment, which extinguishes the rights of an original party to the contract, is different. 9 *Corbin on Contracts* §891, at 512.

The error in this portion of our 2006 analysis, however, is immaterial. Although the assignment extinguished rather than amended the old contract, it also created a new contract. *See Williams v. Maryland Glass Corp.*, 134 Md. 320, 327 (1919) (when a new party is substituted but the contractual terms are otherwise unchanged, the old contract is extinguished and a new one erected). The second part of the alternative formulation set out in the 2006 opinion, that reassignment of the franchise is an "approval of a new contract with the replacement operator," is correct. When, on October 1, the City Council considered whether to transfer the parcels from the incumbent operator to a new one, it was engaged in the process of

“approving a contract.” Therefore, as we held in 2006, the discussion is a quasi-legislative function subject to the Act.

In his letter, Mr. Ayres pointed out that the October 1 discussion focused on the ability of the proposed franchisee to meet the payment requirements under the franchise. In considering the franchisee’s financial capacity, credit information was discussed. As Mr. Ayres correctly observed, such information “is confidential and not subject to [disclosure under] the Public Information Act.... To discuss this in the public forum would divulge confidential information resulting in the Mayor and City Council violating the very law they are charged with administering.”

This is a forceful argument for why at least this portion of the discussion could justifiably be held in closed session. Under §10-508(a)(13), the City Council may close a meeting “to comply with a specific ... statutory ... requirement that prevents public disclosures about a particular proceeding or matter.” The Public Information Act’s prohibition against disclosure of confidential commercial or financial information is one such statutory prohibition. *See* §10-617(d). But this well-founded argument – that a meeting may be closed under these circumstances – does not support the incorrect proposition that the meeting is completely excluded from the Open Meetings Act.

III

Conclusion

The October 1, 2007, meeting of the Mayor and City Council of Ocean City was subject to the Open Meetings Act. We are unable to reach a conclusion whether the meeting was properly closed under the Act or whether portions of the meeting were outside any of the Act’s exceptions and so should have been open to the public.

OPEN MEETINGS COMPLIANCE BOARD

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